UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

C. SPIRITO, INC.

and Case 1-CA-40906

INTERNATIONAL UNION OF
OPERATING ENGINEERS. LOCAL 4, AFL-CIO

Joseph F. Griffin, Esq., for the General Counsel
Burton E. Rosenthal, Esq., for the Charging Party
James F. Grosso, Esq., for the Respondent

DECISION

STATEMENT OF THE CASE

Jane Vandeventer, Administrative Law Judge. This case was tried on February 9, 10, and 11, 2004, in Boston, Massachusetts. The complaint, as amended at hearing, alleges Respondent violated Section 8(a)(1) of the Act by interrogating employees about their union affiliation and threatening employees because of their union activities, and with the futility of organizing, and several other instances of coercive conduct described more particularly below. The complaint also alleges Respondent violated Section 8(a)(3) of the Act by refusing to consider for employment and to hire approximately five employees, or to consider them and other employees for employment because of their union support or affiliation. In addition, the complaint alleges Respondent violated Section 8(a)(3) of the Act by changing the job assignment of one employee, and refusing to reinstate and thereafter discharging six employees. The Respondent filed an answer denying the essential allegations in the complaint. After the conclusion of the hearing, the parties filed briefs which I have read.

Based on the testimony of the witnesses, including particularly my observation of their demeanor while testifying, the documentary evidence, and the entire record, I make the following

Findings of Fact

I. Jurisdiction

Respondent is a corporation with an office and place of business in East Weymouth, Massachusetts, where it is engaged in the construction industry in the provision of site preparation services. During a representative one-year period, Respondent provided services valued in excess of $50,000 directly to points outside Massachusetts. Accordingly, I find, as

Respondent admits, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Charging Party (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. Unfair Labor Practices

A. The Facts

1. Background

Respondent is a construction industry contractor which does site preparation work, including demolition, leveling, erosion control, digging, drilling, and blasting rock, among other tasks. Respondent uses heavy equipment such as bulldozers, front-end loaders, excavators, end dumps, and hammers to accomplish this work. Respondent employs heavy equipment operators as well as laborers, supervisors, and a small office staff. A. Robert Spirito (spoken of as "Bob Spirito" in the record) is the owner of the company, Karl Dickman is the General Manager, Steve Pelletier and Robert Robicheau are site supervisors, and Mark Walker was the Project Manager at the time of the events herein. All these individuals were supervisors and agents of Respondent. In 2003, Respondent had several jobsites it was working on, referred to in the record by their locations. The Waltham jobsite was slated to be a parking garage. The Weymouth jobsite was to be a high school. There were also jobsites located in Auburn and Kingsport, Rhode Island. It is undisputed that the Auburn jobsite was an hour's drive from the Respondent's office in Weymouth and the Weymouth jobsite.

The Charging Party has represented employees who operate heavy equipment in the area involved herein for many years. Near the end of 2002, the Charging Party decided to attempt to organize the employees of Respondent. Over the course of a few months, representatives of the Union had several conversations with Spirito, attempting to convince him that the Union could refer highly qualified operators to his jobs. In addition, the Charging Party encouraged its members to apply for jobs at Respondent. Finally, the Charging Party set up an informational picket at Respondent's Weymouth jobsite, and maintained it for a few months.

2. The January Applicants

It was stipulated that Respondent placed newspaper advertisements for operator employees beginning on January 7, 2003,[1] in the *Patriot-Ledger*, a newspaper that serves the extended metropolitan area south of Boston, including Quincy and nearby towns, and sometimes called the "South Shore" area in the record herein. Union organizer Chris Fogarty visited Respondent's office to inquire about application procedures. He was given an application form and was told by office personnel that he was permitted to send the application in by facsimile, and that Respondent retained applications for consideration indefinitely. On January 10, twenty-five employees who were union members and who stated so on their applications came to Respondent's office, and handed in their applications one at a time.

[1] All dates hereafter are in 2003, unless otherwise specified.

Robert Spirito admitted that he looked at their applications, if at all, in a cursory manner, and that he did not call any of the twenty-five applicants, nor did he interview or hire any of them. The qualifications of each of the individuals are set forth on their employment applications, and include many individuals with extensive experience in operating heavy equipment of the type used by Respondent. Respondent's General Manager, Dickman, testified that it was his custom to review applications, and to pass on to Spirito only those applications of individuals who were qualified to do the work. It was stipulated that between February 24 and May 3, Respondent hired four employees who performed operator work: Steve Vaughn, Kevin Downey, Nick Brooks, and Steve Flattery. It was further stipulated that Respondent hired an additional operator in August. These were not the only individuals Respondent hired during the relevant time period.

Beginning in early March, the Union engaged in area standards picketing at Respondent's Weymouth jobsite. The general contractor set up a separate gate for Respondent.

3. William Wilson

On April 4, William Wilson, a heavy equipment operator who was not a member of the Union at the time, visited the Weymouth jobsite and spoke to Pelletier about applying for a job. Pelletier told Wilson that Respondent was looking for employees, and that he should go to Respondent's office and fill out an application. At the time, Wilson was driving a vehicle which had a decal in the back window with the Union's name on it. Wilson immediately went to Respondent's office and submitted an application. When he had done so, he was interviewed by Bob Spirito in his office. After talking over Wilson's qualifications and experience, Spirito asked Wilson if he had anything to do with the Union or if he wanted to get in the Union. Wilson said that he did not, and added that he had been working for a non-union company for 15 years. Spirito told him that he would hire him, told him which jobsite he wanted him to work on, and they agreed on a pay rate of $28 an hour. Spirito told Wilson that he wanted him to start work the following day. Wilson said that he needed to call the company he had worked for in the past to let them know.

At the Weymouth jobsite, after Wilson had left for Respondent's office, Pelletier remarked to employee Kevin Downey that he couldn't believe "the gall of those guys, sending over a guy with a sticker on his truck." He asked Downey rhetorically if the Union thinks Respondent is stupid. Pelletier did not deny this conversation.

When he returned home that evening, Wilson had a message on his telephone voice mail from Spirito telling him that he did not need him to go to work after all. Spirito admitted that he had offered Wilson a job, but further testified that he changed his mind after talking it over with an individual who claimed to know Wilson and called him a "troublemaker." Spirito says that he told Wilson that he had changed his mind about hiring him. It was stipulated that Respondent again advertised in the *Patriot-Ledger* newspaper for operator employees on about April 8.

Wilson was a straightforward witness who demonstrated good recollection. Spirito did not show a good demeanor, and his recollection of this and other events did not appear to be particularly detailed. His testimony overall demonstrated poor recall. I credit Wilson over Spirito, and, where any conflict exists, over Pelletier.

4. Kevin Downey

Kevin Downey applied for a job and was interviewed at Respondent on January 13th. Although he was a Union member of many years, he did not reveal that fact on his application, nor in his interview. In early March, Bob Spirito called Downey and asked him to come in for a second interview. At the time, Downey was asked about his qualifications, including his ability as a "finish" bulldozer operator. Spirito hired Downey at a rate of $42 an hour, and Downey began work for Respondent on March 12 at the Weymouth jobsite. He worked as an operator on a piece of equipment called the D-8 bulldozer (or 'dozer) for all but one day. On that day, the crusher was not operating, and so Pelletier sent Downey to another jobsite to operate a grader for a few hours. Once the crusher was running again, Downey was ordered back to the Weymouth site and the D-8. Over his whole employment prior to showing his union sympathies, Downey was assigned to the D-8 'dozer at all times except two occasions when equipment was being repaired, the crusher on one occasion and the D-8 on another occasion, and once on overtime. His testimony was not contradicted on this point, and I credit it.

During approximately his first two months of employment, Downey did not reveal his Union membership to any supervisor at Respondent. Early in May, however, Downey had trouble with his vehicle, and Union organizer Wyman offered to lend him a vehicle to drive to work. The vehicle was a car painted bright yellow, with the words "Rat Patrol," "Rat Tracker" and "Local 4" lettered on it. Downey accepted the offer, and on May 5th or 6th, drove the Local 4 car to the Weymouth jobsite, and parked it in the usual employee parking area. Pelletier noticed the car, and asked Downey what he was doing with that car. Downey replied that he had borrowed it from Steve Wyman. About half an hour later, Pelletier came to Downey and told him that he was not permitted to have the Local 4 car on the jobsite, and that Spirito, as well as the general contractor, TLT, were not pleased with it being there. Downey said he didn't know what to do with it. Pelletier repeated that he couldn't have it on the site, and that he had to get it off the site. He suggested Downey park it at a business that was about a fourth of a mile away. Downey drove the car off the site and gave it to Steve Wyman, who was outside the gate engaged in informational area standards picketing. Pelletier drove Downey back to the work area, and while driving, told Downey not to bring the Local 4 car back to work. Pelletier said it was a dumb thing to do, and that Downey could lose his job over it. Pelletier repeated that Respondent did not want the car on the site.

That day some of the other employees called Downey "Rat Boy" and "Rat Man" and asked him whether he had joined the Union last week. The following day, at the same time he called Downey Rat Boy, an employee threw a rock at Downey, which hit him behind the left ear. Downey reported this incident to Pelletier. According to Downey, Pelletier ignored his request. As Pelletier in his testimony simply denied having any recollection of the incident, Downey's testimony concerning it is uncontradicted.

On the same day, Downey began to hand out Union leaflets to other employees at lunchtime. On that day or the next, Downey was reassigned to a piece of equipment called the rock hammer, described by Downey as an excavator with a pneumatic hammer on it. Respondent replaced Downey on the D-8 with another employee, David Ahrens. Downey had been assigned to the rock hammer on only a couple of occasions, once on overtime, and once when the D-8 was broken.

On May 8th, Downey gave out Local 4 union stickers that employees could put on their hard hats. Downey put one on his hard hat. The following day, four more employees – Robert Burr, Chris Anderson, David Ahrens, and Stephen Hatch – put Local 4 stickers on their hard hats. Also on May 8th, as Downey was driving away from the jobsite in the Local 4 car, he remembered that he had forgotten his keys, and returned to the jobsite to get them. He drove onto the jobsite and retrieved his keys from the machine. A superintendent for the general contractor, whom Downey knew only by the name Matt, told Downey to get the (obscenity) car off the site, or "it's your job."

The following day, a Friday, Downey noticed Matt talking with Respondent superintendent Mark Walker. Downey could see that Matt was pointing at Downey while he was talking. At the end of the workday, Walker called Downey over to talk with him. Walker told Downey to report to a different jobsite, one in Auburn, on Monday morning. Walker did not explain the reassignment nor did he tell Downey how long he would be assigned to the Auburn jobsite. Walker did not testify in this proceeding.

On Monday morning, May 12, Downey returned to the Weymouth jobsite in company with Union organizer Chris Fogarty, where he first talked with two employees and told them that he was going to go on an unfair labor practice strike, and that he was going out to the gate to join the picketers. He then told Pelletier the same thing. He also gave Pelletier a letter stating that he was going on an unfair labor practice strike.

Wyman and Fogarty had discussed Union representation with Respondent's operator employees, and eight of them had signed a statement designating Local 4 as their bargaining representative. Among the employees who signed the designation were Chris Anderson, Steve Hatch, Rob Burr, Kevin Downey, Mike Pusateri, and David Ahrens. Wyman and Fogarty went to see Bob Spirito on May 13th and presented him with the signed designation. They talked with him about Respondent and the Union negotiating, but no negotiations were agreed upon, and the meeting ended after only a few minutes.

A few days later, on May 15, Downey and Fogarty went to the Weymouth jobsite where Downey told Pelletier that he was ending his strike and returning to work. They gave Pelletier a letter stating the same thing. Pelletier initially said that he might have some work for Downey at the Auburn jobsite, but then left them for a few minutes. When he returned, he said he had no work for Downey. A few days later, Downey received a letter dated May 19th from Respondent stating that Respondent assumed that Downey had "voluntarily quit…effective May 12th."

Downey offered to return to work unconditionally again on May 28. It is undisputed that Respondent did not recall him to work.

5. Michael Pusateri

Michael Pusateri had been employed by Respondent for about one year at the time of the events in May. He was one of the employees who signed the letter of May 13 requesting recognition of the Union as the employees' bargaining representative. The following day, May 14, Pusateri asked Dickman about a raise in pay that he had been promised. Dickman replied that he had "signed the paper" and that Bob Spirito had recognized that. Dickman also said that that was the "worst thing" Pusateri could have done, and that the shit was going to hit the fan.

Pusateri asked why the lesser skilled laborer employees made more than he did. Dickman said it's because they are in the union. Pusateri said, then maybe it's time to join the Union. Dickman also told Pusateri that Bob Spirito might sign a contract with the laborers union, but he would never sign a contract with the Local 4 (the Union). Dickman recalled discussing a raise with Pusateri, but denied making most of the statements Pusateri testified to. As between the two witnesses, Pusateri was by far the more impressive witness. Dickman equivocated, changed his testimony on a few occasions, demonstrated a poor memory, and poor demeanor. Where there is conflict, I credit Pusateri's testimony.

A week later, on May 21, Pusateri was working on the Waltham jobsite. During the day, he talked by telephone to four other employees who told him that they were on strike, and asked him to join them on strike at the Weymouth jobsite. The employees were Chris Anderson, Rob Burr, Dave Ahrens, and Steve Hatch. After talking with them, he approached Foreman Robicheau and asked him what was going on. Robicheau confirmed that the four employees were on strike. Pusateri asked if it was true that Robicheau had voiced his opinion that employees should be in the union in a trade. Robicheau admitted that he had said so, but that "this isn't the way to go about this." After taking a few minutes to think about his decision, and talking to his father by telephone about it, Pusateri told Robicheau that he was going to join the employees on strike. Robicheau told him that if he was going to do it, "don't bother coming back." Robicheau repeated several times that Pusateri should not come back. Robicheau, in his testimony, admitted telling Pusateri that he would assume that Pusateri quit if he left to join the other striking employees, but denied telling him that he should not come back. Where there are conflicts between the testimony of Pusateri and Robicheau, I credit Pusateri. He was a particularly good witness.

Thereafter, Pusateri joined the other employees at the Weymouth jobsite and picketed with them for approximately a week and a half.

6. The May 21 Strike

Robert (or Rob) Burr was an operator who had worked for Respondent for approximately two and a half years by May. He operated the bucket loader at the Weymouth jobsite, but was qualified to run the portable crusher and excavator as well. Burr had signed the letter designating Local 4 as his bargaining representative. On May 20 Burr ran the loader as usual for most of the day, but in the afternoon, Pelletier assigned Burr to do work normally performed by the laborer job classification, digging footings with a hand shovel. Burr requested that Pelletier give him a ride to the assigned area, as it was about 1500 feet away. Pelletier refused, saying, "you can use the walk, you fat (obscenity)." Pelletier testified that he had indeed said this to Burr. Burr walked to the area he had been assigned, and dug footings for about 15 minutes. Burr then returned to the loader and continued working on the loader. Pelletier came over to Burr and told him to leave the jobsite. Burr complied. After he left the jobsite, he telephoned Mark Walker, and told him what had happened. Walker said that he didn't know what to say, and promised to call Burr back.

The next morning, May 21, Burr went to the Weymouth jobsite and talked to employees Hatch and Anderson. He told them what had happened to him on the day before. Pelletier came up to Burr and told him that there was no work for him. Pelletier said that there might be work in Auburn, but he did not tell Burr to go to the Auburn jobsite. Burr testified without

contradiction that he was never told by any supervisor to report to the Auburn jobsite. Burr left the jobsite, and went out to the gate, where he picked up a picket sign which included the words "unfair labor practice" and "Spirito." The same day, he solicited the support of fellow employees in the strike.

Chris Anderson, an operator employee of Respondent for about three and a half years by May, and David Ahrens, a two year employee, were two of the other employees who signed the Union's May 13 letter seeking recognition. A couple of days later, Mark Walker asked them if they had signed the Union's letter.

At lunchtime on May 21, at the Weymouth jobsite, after Burr asked for their support in striking against Respondent, Anderson and Ahrens, along with 20 year employee Steve Hatch, and later Mike Pusateri, joined Burr on strike. Hatch had also signed the letter designating the Union as his bargaining representative. The five employees carried signs which read, "Unfair Labor Practice Strike." The same day, all five employees signed a letter to Respondent stating that they were on an unfair labor practice strike. They dated their signatures May 21. Evidence in the record shows this letter was received by Respondent on May 23. The General Counsel takes the position that the strike was initially an economic strike, but that it was converted to an unfair labor practice strike late on May 21 when Respondent informed employees by letter that they were no longer working for Respondent.

Respondent sent Burr a letter dated May 22 in which it stated that Burr had been told to work at the Auburn jobsite, but had not shown up, and that Respondent therefore assumed he had "voluntarily quit" his employment. Anderson, Ahrens, Hatch and Pusateri were all sent identical letters dated May 21 stating that they had failed to return to work after their lunch break, and that therefore Respondent assumed that they too had "voluntarily quit" their employment.

It is undisputed that the area where the five employees picketed at Respondent's separate gate at the Weymouth jobsite was in plain view of Respondent's supervisors. Bob Spirito testified that he was fully aware of the strike by employees on May 21. He testified that they "walked off to join the picket line."

It is undisputed that on May 28, the Union hand delivered a letter to Respondent stating that Burr, Anderson, Hatch, and Pusateri were ending their strike, and offering to return to work unconditionally. It is further undisputed that Respondent has never reinstated any of these four employees.

7. Respondent's Use of its Employees

After the terminations of the five strikers, Respondent hired only a few operators in the succeeding few months, but instead, utilized laborers and a subcontractor named Lanzilotta to do a good deal of operator work. While Spirito claimed that this was a normal type of work to assign to a subcontractor, he also admitted that he had never before hired operators along with the machinery. He had merely leased extra equipment and had his own operators run the equipment. I do not credit Spirito that he would normally have used the subcontractor's employees to perform normal bargaining unit work. Instead, I find that Spirito, for many months following the strike activity of his employees, avoided hiring operators by using laborer employees and subcontractor employees to perform normal bargaining unit operator work.

B. Discussion and Analysis

1. The Section 8(a)(1) Allegations

Sprito's questioning of job applicant Wilson on April 4 about whether he was associated with the Union or wanted to join the Union took place in the context of a job interview, during a meeting between the applicant and the owner of Respondent, its top official. The interview context, as well as the private meeting with the top management official are factors which augment the coercive nature of the questions about Wilson's union sympathies and affiliation. See, e.g., ***M. J. Mechanical Services,*** 324 NLRB 812, 813 (1997); ***Contractor Services,*** 324 NLRB 1254 (1997); ***Q 1 Motor Express,*** 323 NLRB 767, 775 (1997); ***ADCO Electric, Inc.***, 307 NLRB 1113, 1117 (1992). I find Respondent's interrogation of Wilson was coercive and violated Section 8(a)(1) of the Act.

Kevin Downey had worked for Respondent for about two months without incident when he revealed his pro-union sympathies by driving a car emblazoned with the Union's name and other union slogans. Respondent's prohibiting Downey from parking in the normal area where other employees parked was admittedly and unabashedly because of the union name and slogans on the car. The uncontradicted testimony of Downey as to what he was told, for example that Respondent's management was angry about his driving the car, adds to the coercive nature of Respondent's conduct. Respondent interfered with Downey's right to support the Union by its prohibition of the vehicle in the parking lot. Even if the impetus for the prohibition came from the general contractor, Respondent's action still violates Section 8(a)(1) of the Act.

In addition, Pelletier told Downey that if he persisted in driving the car which showed his union preference, that he could lose his job over it. In so saying, Pelletier was flatly threatening Downey with discharge for showing his union support. This conduct also violates Section 8(a)(1) of the Act.

The second day Downey drove the Local 4 car, several other employees called him "Rat Man" and other names, and one employee threw a rock which hit Downey. Pelletier blatantly ignored Downey's complaint regarding the assault with the rock. The fact that the supervisor did absolutely nothing about an employee being assaulted with a rock is a clear signal to all the employees that it condoned or approved of such conduct. Such condonation of harassment, or in this case, assault of a pro-union employee, by Respondent violates Section 8(a)(1) of the Act. It coerces not only the pro-Union employee, but also the other employees. ***Bolivar Tee's Mfg. Co.,*** 334 NLRB 1145, 1159 (2001).

On May 14, the day after Pusateri had manifested his support for the Union by signing the letter designating Local 4 as his representative, Dickman implied to Pusateri that he would not get a promised raise because of having "signed the paper." This conduct is coercive and violates Section 8(a)(1) of the Act. Dickman also told Pusateri that Respondent would never sign a contract with Local 4, thereby implying that employees' choice of the Union was futile. Respondent's conduct in that regard is also coercive and violates Section 8(a)(1) of the Act. Dickman further threatened unspecified reprisals in response to the employees' Union activity when he told Pusateri that signing the paper choosing the Union was the worst thing he could have done, and that the shit was going to hit the fan. By this conduct, Respondent again violated Section 8(a)(1) of the Act.

The following week, on May 21, Pusateri decided to join the other employees on strike, and Robicheau told him that if he did so, he should not "bother coming back." This statement is a clear threat to discharge Pusateri if he joined the other employees in their strike, and violates Section 8(a)(1) of the Act.

2. The 8(a)(3) Allegations – January 10 Applicants

In ***FES***, 331 NLRB 9, 12 (2000), the Board held that in order to establish a prima facie case of unlawful refusal to hire, the General Counsel must establish the following elements: "(1) that the respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) that the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, and in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) that antiunion animus contributed to the decision not to hire the applicants" (footnotes omitted).

Here, it is undisputed that Respondent had placed an advertisement for operator employees and did later hire four or five operators. The qualifications of the 25 applicants were stated on their applications, and Respondent's own witness Dickman acknowledged that they were qualified by forwarding the applications to Bob Spirito. Dickman testified that he forwards only qualified applications to Spirito. Respondent contests only the issue of anti-union animus. I find that the record is replete with Respondent's anti-union animus, and that a nexus has been shown to the hiring process. The William Wilson incident and Pelletier's remark implying that Respondent would not hire any applicant who displayed a Union sticker on his vehicle, as Wilson did, shows clearly that Respondent was determined not to hire employees who supported the Union.

I find the General Counsel has established a prima facie case of refusal to hire four of the January 10 applicants.[2] Respondent's defense consisted of stating the reasons it hired the four employees it did hire within the next few months. Respondent produced no credible evidence for its refusal to hire and to consider for hire any of the January 10 applicants, and no credible evidence which would tend to rebut the overwhelming proof of its strong anti-union animus. I find, therefore, that Respondent has not rebutted the prima facie case. I find that Respondent violated Section 8(a)(3) of the Act by failing and refusing to hire four of the January 10 applicants, and that it violated Section 8(a)(3) of the Act by failing and refusing to consider for employment the remaining 21 applicants, all because of their union membership or sympathies.

3. The 8(a)(3) Allegations – William Wilson

Wilson was offered a job by Bob Spirito, and even given a reporting date after he was interrogated by Spirito to make sure that he was not a union supporter. Superintendent Pelletier, however, had seen a union sticker in the window of Wilson's vehicle. I infer from the timing of

[2] While the General Counsel named four of the applicants as those it contended would have been hired, I find no objective basis in the record for the choice of these particular four. I shall recommend that the four most qualified applicants be determined in the compliance stage of the proceeding, as set forth below in the Remedy section.

events that he communicated this fact to Bob Spirito after Spirito had extended a job offer to Wilson. Spirito then withdrew the job offer to Wilson later that afternoon or evening.

The facts that Respondent was hiring and that Wilson was qualified were shown by the job offer to Wilson. Respondent is chargeable with the Pelletier's knowledge of Wilson's union support. See, e.g., ***Glasforms, Inc.***, 339 NLRB 1108, 1110 (2003). Animus is shown by the coercive interrogation of Wilson during his job interview. The prima facie case is straightforward.

In view of the strong prima facie case, Respondent's burden in rebutting that case is a heavy one. Respondent put forth as a defense only a claim that Bob Spirito was told by someone that Wilson had been a "troublemaker" on a previous job. I do not credit Spirito that this was the true reason he withdrew the job offer he had made to Wilson. In any event, the term "troublemaker" has often been used as a code word for union supporter, and has been so found by the Board. See, e.g., ***Kidd Electric Co***., 3113 NLRB 1178, 1187 (1994); ***Kinder-Care Learning Centers***, 299 NLRB 1171, 1175, Fn. 27 (1990). Respondent has not rebutted the prima facie case. I find Respondent's failure to hire Wilson, and its withdrawal of the job offer it made to him were done because he supported the union, and therefore violate Section 8(a)(3) of the Act. ***C. P. Associates, Inc.***, 336 NLRB 167, 169 (2001)

4. The 8(a)(3) Allegations – Kevin Downey

Respondent's reassignment of Kevin Downey to less desirable work (operating the rock hammer) immediately after he displayed his support for the union, and its subsequent transfer of his work location to a more distant work location (Auburn) appear to be in retaliation for his union activities and support. Downey had been assigned to operate the D-8 'dozer for approximately two months. No explanation was given to Downey for the reassignment, and indeed, none was convincingly advanced at trial. The timing and the numerous threatening and coercive Section 8(a)(1) violations which were aimed at Downey during the same few days add certainty to the conclusion that Respondent reassigned Downey to less desirable work and jobsite because of his support for and activities in promoting the union. This conduct violates Section 8(a)(3) of the Act. ***Ekstrom Electric, Inc.***, 327 NLRB 339, 357 (1998); ***Mathis Electric Co.***, 314 NLRB 258 (1994); See also, ***Carter's, Inc.***, 339 NLRB 1089 (2003);

Downey's strike in protest of this unfair labor practice was therefore an unfair labor practice strike from the start. Downey's initial unconditional offer to return to work occurred on May 15, but Respondent did not reinstate him at any time. I find that Respondent did not offer Downey reinstatement to the Auburn jobsite, and that even if it had, that would not constitute a valid reinstatement offer, as the jobsite was clearly less desirable. The same analysis holds true for Downey's later offer, on May 29, to return to work. ***Abilities and Goodwill***, 241 NLRB 27 (1979).

Respondent's discharge of Downey on May 19 clearly violated Section 8(a)(3) of the Act, as Downey was an unfair labor practice striker at the time. It is well settled that informing an employee that he has "voluntarily quit" by going on strike instead of reporting to work is tantamount to a discharge for striking, and violates the Act. ***Controlled Energy Systems***, 331 NLRB 251, 252 (2000).

5. The 8(a)(3) Allegations – the Five May 21 Strikers

A similar analysis applies to the five strikers who began their strike on May 21. The General Counsel has not contended that they struck in protest of unfair labor practices, despite the fact that they carried signs with that legend. Assuming, then that the strike began as an economic strike, Respondent's discharge of four of them on the same day they commenced their strike, and the fifth, Burr, the following day, was without a doubt in retaliation for their strike activity. In addition, Respondent showed by its coercive conduct towards striker Pusateri that it harbored animus against the employees who had signed the May 13th letter requesting recognition of the Union. Their discharges violate Section 8(a)(3) of the Act.

Respondent's claim that the employees "voluntarily quit" because they did not report back to work after lunch is ludicrous, since Respondent's supervisors could plainly see the employees on strike an picketing outside its gates on the afternoon of May 21. Bob Spirito himself described the employees as having left work to join the Union's picket line. In addition to the timing of the discharges of the five strikers, the nexus between the discharges and the employees' union activities is further demonstrated by Respondent's unlawful threat to Pusateri that he risked discharge if he joined the strikers.

Conclusions of Law

1. By interrogating employees about their union membership, affiliation, activities, or sympathies, by threatening employees with loss of wages and other unspecified reprisals because of their union activities, by implying that selection of the Union as representative would be futile, by prohibiting employees from parking in the employees' lot when their vehicles display union insignia, by condoning other employees' harassment of pro-union employees, by threatening employees with discharge and transfer because they engage in union activities, or support the union, by telling employees that they have quit because they engage in a strike, Respondent has violated Section 8(a)(1) of the Act.

2. By refusing to hire employees and by withdrawing offers of employment because of employees' union membership or sympathies, by refusing to consider employees for employment because of their union membership, by transferring employees to less desirable work and work locations, by effectively discharging employees because they engaged in a strike in protest of Respondent's unfair labor practices, and by refusing to reinstate employees because they engaged in a strike in protest of Respondent's unfair labor practices, Respondent has violated Section 8(a)(3) and (1) of the Act.

3. The violations set forth above are unfair labor practices affecting commerce within the meaning of the Act.

The Remedy

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it be required to cease and desist therefrom and to take certain affirmative action necessary to effectuate the policies of the Act.

I shall recommend that Respondent be ordered to offer employment to William Wilson and to the four most qualified employees from the group of 25 applicants who applied for

employment on January 10, 2003, the most qualified to be determined in compliance by an objective standard such as length and depth of experience or other appropriate objective measures.

I shall recommend that Respondent be ordered to consider for future employment the remaining 21 applicants for employment from the group of 25 applicants who applied for employment on January 10, 2003.

I shall further recommend that Respondent be ordered to reinstate Kevin Downey, Chris Anderson, David Ahrens, Rob Burr, Steve Hatch, and Michael Pusateri to their former jobs.

I shall also recommend that Respondent be ordered to remove from the employment records of the employees named and denoted in paragraph 2(d) of the Order any notations relating to the unlawful actions taken against them and to make them whole for any loss of earnings or benefits they may have suffered due to the unlawful action taken against them, in accordance with ***F. W. Woolworth Co.***, 90 NLRB 289 (1950), plus interest as computed in accordance with ***New Horizons for the Retarded***, 283 NLRB 1173 (1987). With respect to Kevin Downey, Chris Anderson, David Ahrens, Rob Burr, Steve Hatch, and Michael Pusateri, their backpay entitlements should be calculated from the dates of their respective effective discharges by Respondent, with attention to the requirements set forth in ***Abilities and Goodwill***, 241 NLRB 27 (1979). In addition, when assessing the amount of work available from operator employees during the appropriate backpay periods, the operator work which would normally have been performed by bargaining unit employees should include the work assigned by Respondent to laborer employees and outside subcontractors during the backpay periods.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The Respondent, C. Spirito, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees about their union membership, affiliation, activities, or sympathies;

(b) Threatening employees with loss of wages and other unspecified reprisals because of their union activities;

(c) Implying to employees that selection of the Union to represent them would be futile;

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(d) Prohibiting employees from parking their vehicles in the employees' lot if those vehicles display union insignia;

(e) Condoning the harassment of pro-union employees by other employees;

(f) Threatening employees with discharge and transfer because they engage in union activities or support the Union;

(g) Telling employees that they have quit because they engage in a strike;

(h) Refusing to hire qualified employees because of their Union membership or support;

(i) Withdrawing previously given offers of employment because of an employee's support of the Union;

(j) Transferring employees to less desirable work or work locations because of their Union activities or support;

(k) Discharging employees because they engaged in a strike in protest of Respondent's unfair labor practices;

(l) Refusing to reinstate employees because they engaged in a strike or other protected activity;

(m) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer William Wilson instatement to the job for which he was initially hired, before the offer was unlawfully withdrawn;

(b) Within 14 days from the date of this Order, offer instatement to the four most qualified applicants from the January 10, 2003, group of applicants, in the manner specified in the Remedy section;

(c) Within 14 days from the date of this Order, offer Kevin Downey, Chris Anderson, David Ahrens, Robert Burr, Steve Hatch, and Michael Pusateri full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(d) Make William Wilson, Kevin Downey, Chris Anderson, David Ahrens, Robert Burr, Steve Hatch, Michael Pusateri, and the four most qualified applicants from the January 10, 2003, group of applicants whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the Remedy section of this decision.

(e) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges and/or failures to hire of the employees set forth in the foregoing paragraph,

and within 3 days thereafter notify the employees in writing that this has been done and that the discharges or failures to hire will not be used against them in any way.

(f) Consider for hire the remaining 21 applicants who applied for employment on January 10, 2003.

(g) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(h) Within 14 days after service by the Region, post at its Weymouth office location and its two largest jobsites at the time of the posting copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 10, 2003.

(i) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated at Washington, D.C., September 16, 2005.

_____

Jane Vandeventer
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT interrogate you about their union membership, affiliation, activities, or sympathies.

WE WILL NOT threaten you with loss of wages or other unspecified reprisals because of your union activities.

WE WILL NOT tell you that we will never sign a contract with the union and thereby imply that it would be futile for you to select the union to represent you.

WE WILL NOT force you to move your vehicles outside the employees' regular parking area when the vehicle displays a union insignia.

WE WILL NOT threaten you with discharge or transfer because you engage in union activities or support the union.

WE WILL NOT tell you that you have quit employment with us because you engage in union or protected concerted activity.

WE WILL NOT reassign you to different jobs or transfer you to other jobsites because you engage in union activity.

WE WILL NOT refuse to hire you or consider you for hire because you are union members or supporters.

WE WILL NOT withdraw an offer of employment we had previously given you because you support the union.

WE WILL NOT discharge you because you engage in a strike in protest of our unfair labor practices, or because you engage in other union activities.

WE WILL NOT refuse to reinstate you because you engage in a strike or other union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of rights guaranteed you by Section 7 of the Act.

WE WILL offer Kevin Downey, Chris Anderson, David Ahrens, Robert Burr, Steve Hatch, and Michael Pusateri reinstatement to their former jobs, and WE WILL make them whole for any loss of pay or other benefits they may have suffered because of our unlawful discharges of them.

WE WILL offer William Wilson employment in the position which we offered him, and later withdrew the offer of, and WE WILL make him whole for any loss of pay or other benefits he may have suffered because of our unlawful withdrawal of our offer of employment.

WE WILL offer employment to four applicants who applied for employment in January 2003, and WE WILL make them whole for any loss of pay or other benefits they may have suffered because of our unlawful refusal to hire them.

WE WILL consider for employment the remaining qualified applicants who applied for employment in January 2003.

C. SPIRITO, INC.

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

10 Causeway Street, Boston Federal Building, 6th Floor, Room 601

Boston, Massachusetts 02222–1072

Hours of Operation: 8:30 a.m. to 5 p.m.

617-565-6700.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 617-565-6701.